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24 **UNITED STATES DISTRICT COURT**
25 **FOR THE DISTRICT OF NEVADA**
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JAMES V. DEPPOLETO JR.,
Individually and Derivatively on Behalf of
Nominal Defendant Takeover Industries
Incorporated

Plaintiff,

v.

TAKEOVER INDUSTRIES
INCORPORATED,
Defendant and Nominal Defendant

MICHAEL HOLLEY,

TOBY MCBRIDE,

JOSEPH PAVLIK,

TOM ZARRO,

and

NEXTGEN BEVERAGES, LLC

Defendants.

CASE NO. 2:22-cv-02013-GMN-MDC

**PLAINTIFF’S REPLY IN SUPPORT OF HIS
MOTION FOR PARTIAL SUMMARY
JUDGMENT PURSUANT TO FED. R. CIV. P.
56(a)**

MEMORANDUM OF POINTS AND AUTHORITIES

James V. Deppoleto Jr. (“Deppoleto” or “Plaintiff”) moved the Court for Partial Summary Judgment against Takeover Industries Incorporated (“Takeover”) with respect to Count II, Breach of Contract, and against Takeover, Michael Holley (“Holley”), Tom Zarro (“Zarro”) and NextGen Beverages, LLC (“NextGen Beverages”) (collectively, “Defendants”) with respect to Count VII, Fraudulent Transfer.

Defendants’ Response Brief makes deciding this Motion straightforward. Takeover confirmed that: (a) it accepted \$2,015,698.48 from Deppoleto pursuant to the Notes and

1 Supplemental Loans¹; (b) Takeover has failed to make good on its promise to repay Deppoleto;
 2 and (c) Takeover has transferred property out of Deppoleto's reach. Rather than disputing
 3 those facts, Takeover attempts to defeat Deppoleto's Motion for Partial Summary Judgment
 4 through misdirection: with almost no admissible evidence to support its position, Takeover
 5 nevertheless invites the Court to adopt novel legal theories, and to engage in speculation about
 6 irrelevant allegations that have nothing to do with the straightforward questions at issue in
 7 Deppoleto's Motion.

8 However, none of Defendants' arguments in opposition to Deppoleto's Motion relieve
 9 Takeover of its \$2 million worth of contractual obligations to Deppoleto, or absolve Takeover
 10 from fraudulently transferring assets to company insiders, Holley and Zarro, and to their new
 11 company, NextGen Beverages. Because the undisputed facts demonstrate that no reasonable
 12 jury could find in Takeover's favor, the Court should grant Deppoleto's Motion for Partial
 13 Summary Judgment.

14 ARGUMENT

15 Takeover failed to overcome Deppoleto's Motion for Summary Judgment. Although
 16 the moving party bears the initial burden, "the burden in opposing a motion for summary
 17 judgment is not to be underestimated." *Sorayama v. Robert Bane. Ltd., Inc.*, No. CV 05-1431
 18 FMC (MCX), 2006 WL 8432085, at *4 (C.D. Cal. Jan. 27, 2006). The non-moving party
 19 cannot simply "assert the falsity of the moving party's evidence." *Id.* Rather, summary
 20 judgment is the "***put up or shut up*** moment in a lawsuit, when a party must show what
 21 evidence it has that would convince a trier of fact to accept its version of events." *Allstate*
 22 *Prop. & Cas. Ins. Co. v. Mirkia*, No. 2:12-CV-01288-RCJ, 2014 WL 2801310, at *9 (D. Nev.
 23 June 19, 2014) (emphasis added). Additionally, the non-moving party must put forward
 24 "specific facts, and not allegations to show that a genuine factual issue remains for trial."
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28 ¹ All capitalized terms have the same meanings as used in Deppoleto's Motion for Partial Summary Judgment. (Dkt. No. 100.)

1 *DeHorney v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 879 F.2d 459, 464 (9th Cir. 1989). In this
 2 case, Takeover has failed to put forward admissible evidence or “specific facts” that would
 3 enable a trier of fact to accept its version of events. As such, the Court should grant
 4 Deppoleto’s Motion for Partial Summary Judgment.

5
 6 **A. The Court should grant Deppoleto summary judgment on his breach of contract claim against Takeover.**

7 Takeover does not dispute the following material facts: (1) Deppoleto loaned Takeover
 8 \$1.5 million in principal pursuant to the Note Purchase Agreement (the “NPA”) and the Notes;
 9 (2) Deppoleto made two payments on Takeover’s behalf directly to Takeover’s vendor, Great
 10 Northern Corporation, in the amount of \$515,698.48 (the Supplemental Loans); and (3)
 11 Takeover has failed to repay Deppoleto. Despite those admissions, Defendants purport to raise
 12 several defenses in opposition to Deppoleto’s Motion. However, their defenses are meritless.

13 **1. A majority of Takeover’s Board of Directors consented to the NPA and**
 14 **Notes.**

15 Takeover argues that the NPA and Notes are not enforceable contracts because Holley
 16 did not consent to them. While Holley was one of Takeover’s original Directors, Takeover
 17 changed the composition of its Board of Directors in December 2021, when the Directors voted
 18 to remove Holley from the Board of Directors. (Dkt. No. 102-2 at 81:14-21, 82:11-16; Dkt.
 19 No. 102-1 at 28:7-28:15, 93:24-95:1, 97:5-11, 98:1-100:6; Dkt. No. 102-3 at 155:15-21; Dkt.
 20 No. 102-4 at 84:23-86:11.) Accordingly, between May 2022 and August 2022 when the NPA
 21 and Notes were executed, the Takeover Board solely consisted of McBride, Tucker, and Pavlik.
 22 (Dkt. No. 102-2 at 82:11-20.) And those are the Directors who signed the First Consent,
 23 Second Consent, and Third Consent that approved Takeover entering into the NPA, the First
 24 Amendment, and the Second Amendment. The consents also authorized the President of
 25 Takeover to take such actions to execute and deliver, and otherwise effect, the transactions
 26 involving the NPA, First Amendment, and Second Amendment and Deppoleto’s related debt
 27 interest.
 28

1 Even though Takeover does not dispute that Holley was removed from Takeover's
 2 Board of Directors in December 2021 (Dkt. No. 111 at 9) – meaning, accordingly, the Board
 3 consisted of only Tucker, Pavlik, and McBride at the time that the contracts were entered –
 4 Takeover argues that Holley's removal was improper, and that Takeover's contracts with
 5 Deppoleto are void. (Dkt. No. 111 at 11.) Even if Holley was improperly removed from
 6 Takeover's Board of Directors – which Deppoleto disputes, but that question is not material to
 7 this Motion – the NPA and Notes are still valid under Nevada corporate law, because a
 8 majority of Takeover's Board members consented to the contracts.

9 Nevada Revised Statute section 78.315(1) provides that an action taken by the *majority*
 10 of Board Members is an action *of the Board*:

11 Unless the articles of incorporation or the bylaws provide
 12 for a greater or lesser proportion, a majority of the board of
 13 directors of the corporation then in office, at a meeting duly
 14 assembled, is necessary to constitute a quorum for the
 15 transaction of business, and the act of directors holding a
 16 majority of the voting power of the directors, present at a
 17 meeting at which a quorum is present, is the act of the
 18 board of directors.

19 *Id.* That is important, because even if – as Takeover now claims – Takeover's Board in 2022
 20 consisted of four members (Holley, Pavlik, McBride, and Tucker), three of those members
 21 (Pavlik, McBride, and Tucker) signed the Consents, and those three members constituted a
 22 majority of the Board. Therefore, under Nev. Rev. Stat. § 78.315(1), the Consents – which
 23 were approved and issued by McBride, Tucker, and Pavlik – constituted actions of the
 24 Takeover Board. *See Pope Invs., LLC v. China Yida Holding, Co.*, 137 Nev. 335, 340, 490
 25 P.3d 1282, 1288 (2021) (“NRS 78.315(1) provides simply that an act by directors holding a
 26 majority of the directors' voting power is an act of the board[.]”). Takeover's Response does
 27 not contain any admissible evidence to demonstrate that, when the Consents were issued,
 28 McBride, Tucker, and Pavlik were not properly serving as Board members. Therefore, there is
 no material factual dispute as to whether the Deppoleto agreements are valid. *See id.*

After the Board signed and issued the Consents, Tucker, as President of Takeover,

1 signed and executed the NPA and the Notes issued to Deppoleto. As such, the contracts
 2 became a binding obligation on Takeover, as mandated by Nevada corporate law. Nevada
 3 Revised Statute section 78.135(3) provides:

4 Any contract or conveyance, otherwise lawful, made in the name
 5 of a corporation, which is authorized or ratified by the directors,
 6 or is done within the scope of the authority, actual or apparent,
 7 given by the directors, binds the corporation, and the corporation
 8 acquires rights thereunder, whether the contract is signed or is
 9 wholly or in part executory.

10 *Id.* Because Tucker was acting pursuant to Consents issued by the Board of Directors,
 11 Tucker's execution of the NPA and Notes binds Takeover. Takeover did not offer any
 12 evidence to demonstrate that Tucker was not properly serving as Takeover's President when
 13 the contracts were signed and executed. In short, Takeover failed to raise a genuine dispute of
 14 material fact that the NPA and Notes are not valid contracts.

15 **2. The Supplemental Loans constitute valid and enforceable contracts.**

16 As to the Supplemental Loans, neither Takeover's factual nor legal arguments in
 17 opposition could convince a reasonable trier of fact to accept Takeover's claim that the
 18 Supplemental Loans are invalid and unenforceable. *See Allstate Prop. & Cas. Ins. Co. v.*
 19 *Mirkia*, No. 2:12-CV-01288-RCJ, 2014 WL 2801310, at *9 (D. Nev. June 19, 2014)
 20 (explaining the burden required to overcome a motion for summary judgment).

21 Takeover disputes that Tucker, Takeover's President, "properly entered" into the
 22 Supplemental Loans. (Dkt. No. 111 at 10, 11.) Other than Takeover's bare assertion that it
 23 "disputes" the validity of the Supplemental Loans, Takeover has not cited any actual evidence
 24 to contradict Deppoleto's sworn testimony that he and Takeover agreed that the Supplemental
 25 Loans would be funded as part of the NPA and result in a fourth Note, similar to the Third
 26 Note. (Dkt. No.102-15 at 98:22-99:24; Dkt. No. 101 ¶¶ 2-7.) And, notably, Takeover does not
 27
 28

1 dispute that Deppoleto made the Supplemental Loan payments on Takeover's behalf directly to
 2 Takeover's vendor, Great Northern Corporation, in the amount of \$515,698.48. "When a
 3 motion for summary judgment is properly made and supported, an opposing party may not rely
 4 merely on allegations or denials in its own pleading; rather, its response must – by affidavits or
 5 as otherwise provided in [Rule 56] – set out specific facts showing a genuine issue for trial."
 6 *TRC, Inc. v. United States*, No. 2:09-CV-00205-KJD, 2011 WL 43090, at *2 (D. Nev. Jan. 6,
 7 2011). Takeover's assertion that Tucker did not "properly enter" into the Supplemental Loans,
 8 without any evidence in support, is insufficient to create a genuine dispute of material fact.

10 Takeover's remaining arguments regarding the enforceability of the Supplemental
 11 Loans are similarly unconvincing. Takeover contends that the Supplemental Loans are not
 12 valid because there was no "clear mutual assent" between Takeover and Deppoleto as to the
 13 terms of the Supplemental Loans. (Dkt. No. 111 at 17); *Kurian v. SNAPS Holding Co.*, No.
 14 219CV01757GMNEJY, 2021 WL 4429309, at *4 (D. Nev. Sept. 27, 2021) (requiring mutual
 15 assent to form a valid contract). To purportedly support its argument, Takeover references the
 16 declarations of Holley and Pavlik; however, neither Holley's nor Pavlik's Declarations include
 17 any testimony regarding the Supplemental Loans.² On the other hand, Deppoleto has provided
 18 sworn testimony that he and Takeover agreed that the Supplemental Loans would be funded as
 19 part of the NPA and result in a fourth Note, similar to the Third Note. *See May*, 119 P.3d at
 20 1257 (holding that an enforceable contract exists when the parties agree to the material terms).
 21 Even though the Supplemental Loans were not reduced to writing, Deppoleto and Takeover
 22 agreed that they would follow form to the terms of the NPA and Notes. As a result, the terms

26 ² Takeover does not cite to any specific paragraphs in either Holley or Pavlik's Declarations,
 27 and it is not the Court's task "to scour the record in search of a genuine issue of triable fact."
 28 *Californians for Renewable Energy v. California Pub. Utilities Comm'n*, 922 F.3d 929, 935–36 (9th Cir. 2019).

1 of the Supplemental Loans are clear and definite. And after agreeing that the Supplemental
 2 Loans would be funded as part of the NPA, Deppoleto made two payments on Takeover's
 3 behalf directly to Takeover's vendor, Great Northern Corporation, for the development of
 4 product displays for Takeover's gamer shots, which Takeover does not dispute.

5 Takeover next argues that the Supplemental Loans are unenforceable because the NPA,
 6 First Amendment, and Second Amendment contain integration clauses that purportedly "bar
 7 incorporating additional loans."³ (Dkt. No. 111 at 17.) But, Takeover misinterprets the reach
 8 of the integration clauses. Paragraph 9.10 of NPA states:

10 This Agreement, the Note and the other documents
 11 delivered pursuant hereto constitute the full and
 12 entire understanding and agreement between the
 13 parties with regard to the subjects hereof and
 14 thereof. The terms of this Agreement and the Note
 15 may be amended and the observance of any term of
 16 this Agreement or the Note may be waived (either
 generally or in a particular instance and either
 retroactively or prospectively) only in a writing
 executed by the Company and the Purchaser.

17 Paragraphs 12 of the First Amendment and Second Amendment similarly state: "Except as
 18 expressly set forth herein, there are no agreements or understandings, written or oral, among
 19 the parties hereto relating to this Amendment." The plain terms of the integration clauses
 20 explain that the NPA, First Amendment, and Second Amendment contain the parties' entire
 21 agreements with respect to those agreements. *See Fed. Nat'l Mortg. Ass'n v. Westland Liberty*
 22 *Vill., LLC*, 138 Nev. 614, 619, 515 P.3d 329, 334 (2022) ("[Courts] interpret unambiguous
 23 contracts according to the plain language of their written terms."). By their plain terms, the
 24 integration clauses do *not* limit *subsequent* agreements between Takeover and Deppoleto, such
 25 as the Supplemental Loans. In other words, the integration clauses have no bearing on the
 26

27 ³ Takeover cites *Morrow v. Morrow*, 103 Nev. 610, 747 P.2d 1386 (1987), in support of its
 28 integration clause arguments. However, Plaintiff is unable to locate *Morrow v. Morrow* because neither
 the reporter citation of "103 Nev. 610" nor "747 P.2d" return the cited case name, and the only result for
 "*Morrow v. Morrow*" that Plaintiff could locate is a divorce case from 1945.

1 validity of the Supplemental Loans, because the Supplemental Loans do not modify the terms
2 of the NPA, First Amendment, or Second Amendment.

3 **3. Takeover's affirmative defenses are meritless.**

4 Takeover raises three affirmative defenses in opposition to Deppoleto's breach of
5 contract claim. None of those three defenses have merit.

6 **a. The NPA and Notes are not *void ab initio*.**

7 First, Takeover contends – without any legal authority in support – that it is relieved of
8 its repayment obligation to Deppoleto because the NPA and Notes were *void ab initio* (void
9 from the beginning). (Dkt. No. 111 at 4, 28.) In executing the NPA, Takeover represented that
10 it was not a party to any lawsuit. However, Takeover now admits that it breached this
11 provision of the NPA because at the time it executed the NPA, Takeover was a party to the
12 Arizona Lawsuit. And because Takeover breached this representation, Takeover contends that
13 the NPA is *void ab initio*. In other words, Takeover argues that it should be allowed to accept
14 and spend Deppoleto's money, but then shirk its obligation to repay Deppoleto because it
15 knowingly made a false representation in the NPA. Takeover's position is nonsensical. It
16 would incentivize loan borrowers to make false representations in loan agreements to later
17 relieve themselves of their repayment obligations. That cannot be the law. Tellingly, Takeover
18 has not cited any legal authority in support of its argument. For this reason alone, the Court
19 should reject Takeover's argument. *See Capitol Specialty Ins. Corp. v. Steadfast Ins. Co.*, No.
20 220CV1382JCMVCF, 2022 WL 17852756, at *4 (D. Nev. Dec. 21, 2022) (“This court is not
21 required to address arguments that are not cogently stated nor supported with relevant
22 authority.”).

23 **b. Deppoleto did not breach the implied covenants of good faith and**
24 **fair dealing.**

25 Second, Takeover argues that it does not have a repayment obligation to Deppoleto,
26 because Deppoleto allegedly violated the implied covenants of good faith and fair dealing that
27 accompanied the NPA and Notes. (Dkt. No. 111 at 18.) Takeover's defense fails both
28 factually and procedurally.

i. **Federal Rule of Civil Procedure 8(c) bars Takeover from raising breach of the implied covenants of good faith and fair dealing at the summary judgment stage.**

As a procedural matter, the Federal Rules of Civil Procedure preclude Takeover from asserting a violation of the implied covenants of good faith and fair dealing as an affirmative defense, because Takeover raised it for the first time in its Response Brief. Federal Rule of Civil Procedure 8(c) requires that, “[i]n responding to a pleading, a party must affirmatively state any avoidance of affirmative defense.” Fed. R. Civ. P. 8(c)(1). However, Takeover has never pleaded a breach of the implied covenants of good faith and fair dealing as an affirmative defense. (*See* Dkt. No. 7, 9, 32.) In neither Takeover’s Answer to the original Complaint, nor its Answer to the First Amended Complaint, did Takeover raise an affirmative defense related to a violation of the covenants of good faith and fair dealing. (Dkt. No. 7, 9, 32.) A defendant’s failure to plead an affirmative defense prior to the summary judgment stage cannot be excused when it prejudices the plaintiff. *See Magana v. Com. of the N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir.1997).

In this case, allowing Takeover to raise a new affirmative defense of violation of the covenants of good faith and fair dealing would prejudice Deppoletto, because discovery has closed. Takeover “had ample time to raise an affirmative defense, but has elected to wait until after submitting two answers, performing [discovery], and receiving a motion for summary judgment to do so.”⁴ *Trustees of Elec. Workers Health & Welfare Tr. v. Bright Elec., Inc.*, No. 2:11-CV-01746-KJD, 2013 WL 5278239, at *3 (D. Nev. Sept. 18, 2013) (refusing to consider a defendant’s affirmative defense that was raised for the first time at summary judgment). Because Takeover’s failure to provide Deppoletto with any notice of this affirmative defense would result in prejudice to Deppoletto, Takeover should not be allowed to assert it now. *See Martorell v. Bagchi*, No. 319CV00523MMDCLB, 2021 WL 3824661, at *5 (D. Nev. Aug. 25,

⁴ Plaintiff filed the original Complaint on December 2, 2022 (Dkt. No. 1), and a First Amended Complaint on September 19, 2023 (Dkt. No. 25). Discovery closed on December 9, 2024. (Dkt. No. 86.) In addition, Takeover did not raise this defense in its response to Deppoletto’s Emergency Motion for Partial Summary Judgment filed on December 28, 2022. (Dkt. No. 10.)

2021) (determining that defendants waived their affirmative defenses when allowing them would cause prejudice to the plaintiff).

ii. Even if the Court considered Takeover’s duty of good faith and fair dealing argument, the argument fails.

Even if the Court considered Takeover’s affirmative defense that Deppoletto allegedly violated the implied covenants of good faith and fair dealing, Takeover has not offered evidence in support of its defense. *See Baluma S.A. v. Poff*, No. 220CV1642JCMDJA, 2022 WL 717617, at *2 (D. Nev. Mar. 9, 2022) (“[I]f the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted.”). To establish an affirmative defense of breach of the implied covenants of good faith and fair dealing, a defendant must prove: “(1) the existence of a contract between the parties; (2) that defendant breached its duty of good faith and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) the plaintiff’s justified expectations under the contract were denied.” *Shaw v. CitiMortgage, Inc.*, 201 F. Supp. 3d 1222, 1251 (D. Nev. 2016), *amended in part*, No. 3:13-CV-0445-LRH-VPC, 2016 WL 11722898 (D. Nev. Nov. 1, 2016) (*citing Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335, 338 (1995)).

The underlying contract fixes the boundaries of the implied covenants of good faith and fair dealing. *IceMOS Tech. Corp. v. Omron Corp.*, No. CV-17-02575-PHX-JAT, 2018 WL 3329696, at *10 (D. Ariz. July 6, 2018). Accordingly, any breach of the implied covenants of good faith and fair dealing “must be grounded in the terms of the underlying contract.” *Id.*; *see also Rutter v. Apple Inc.*, No. 21-CV-04077-HSG, 2022 WL 1443336, at *7 (N.D. Cal. May 6, 2022) (“[T]he implied covenant of good faith and fair dealing only extends to obligations expressed in the actual contract.”). In short, the contracting parties must “refrain from doing anything to injure the right of the other to receive the benefits of the agreement.” *San Jose Prod. Credit Ass’n v. Old Republic Life Ins. Co.*, 723 F.2d 700, 703 (9th Cir. 1984).

In this case, Takeover’s defense fails because it has not offered any explanation as to how Deppoletto’s alleged actions injured Takeover’s right to receive the benefits of the NPA and Notes. Takeover specifically alleges that Deppoletto violated the implied covenants of

1 good faith and fair dealing by “removing Pavlik from the Board of Directors, excluding Pavlik
2 from Company meetings, suspending McBride from the Company, representing himself as a
3 ‘Director’ or Takeover, and marketing products to third parties without the knowledge or
4 authorization of McBride or Pavlik.” (Dkt. No. 111 at 5-6 (cleaned up).)

5 As an initial matter, several of Takeover’s factual allegations are undeniably false.
6 First, there is no evidence that Pavlik was ever removed from Takeover’s Board of Directors.
7 Pavlik has been a board member since at least November 2021, and remains one today. (Dkt.
8 102-2 at 77:18-78:7; Dkt. 102-4 at 30:4-6, 35:3-11.) And Pavlik does not contend otherwise in
9 his Declaration. Next, Takeover’s Board of Directors, not Deppoleto, voted to remove Holley
10 from the Board of Directors in December 2021. (Dkt. No. 102-2 at 81:14-21, 82:11-16; Dkt.
11 No. 102-1 at 93:24-95:1, 97:5-11, 98:1-100:6; Dkt. No. 102-3 at 155:15-21; Dkt. No. 102-4 at
12 84:23-86:11.) It is undisputed that Deppoleto was not a Director in December 2021, and never
13 has been. As such, Deppoleto did not vote to remove Holley. (Dkt. No. 102-15 at 43:20-22.)
14 Takeover’s false allegations cannot give rise to a violation of the breach of the implied
15 covenants of good faith and fair dealing.

16 Takeover’s remaining allegations that Deppoleto violated the implied covenants of good
17 faith and fair dealing do not even amount to a “scintilla of evidence” in support of Takeover’s
18 defense. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (explaining that “there
19 must be evidence on which a jury could reasonably find for the party” to overcome summary
20 judgment). Takeover alleges that Deppoleto excluded Pavlik from company meetings and
21 “marketed products to third parties without the knowledge or authorization of McBride or
22 Pavlik.” (Dkt. No. 111 at 5-6.) Takeover does not provide any record citations in support of
23 those allegations. However, Takeover is apparently referencing Pavlik’s request to Tucker,
24 Takeover’s President, to attend a trade show in Las Vegas in October 2022. (Dkt. No. 111-1 at
25 33.) Although Tucker declined Pavlik’s request, as was his prerogative as Takeover’s
26 President, Tucker and Deppoleto attended that trade show and, while there, allegedly pitched a
27 joint business opportunity to another beverage company, allegedly without Pavlik and
28

1 McBride’s knowledge. (Dkt. No. 111-1 at 33.) During this pitch, Takeover alleges that
 2 Deppoleto marketed himself as a Director of Takeover.

3 Takeover’s only evidence in support of these allegations is Pavlik’s Declaration, to
 4 which he attached a slide deck that lists Deppoleto as a Director to Takeover. Pavlik alleges
 5 that this slide deck was presented during the pitch. Of course, Pavlik admits that he did not
 6 attend the pitch meeting, so he has no personal knowledge of its occurrence or what was
 7 presented at the meeting. Without personal knowledge, Pavlik’s testimony regarding the pitch
 8 meeting and the presentation cannot be considered. *See Orr v. Bank of Am.*, NT & SA, 285
 9 F.3d 764, 773 (9th Cir. 2002) (“A trial court can only consider admissible evidence in ruling on
 10 a motion for summary judgment.”); *see also* Fed.R.Civ.P. 56(e). More importantly, Deppoleto
 11 – who *did* have personal knowledge – specifically testified that, upon the advice of counsel, he
 12 never held a Director position with Takeover. (Dkt. No. 102-15 at 43:20-44:5.)

13 However, even if the Court considers Takeover’s allegations, Takeover’s defense fails,
 14 because Takeover has not connected any of Deppoleto’s alleged actions to terms in the NPA or
 15 the Notes that Deppoleto allegedly violated. “[T]he implied covenant of good faith and fair
 16 dealing cannot create . . . new obligations under the [contract].” *IceMOS Tech. Corp. v. Omron*
 17 *Corp.*, No. CV-17-02575-PHX-JAT, 2018 WL 3329696, at *10 (D. Ariz. July 6, 2018).
 18 Deppoleto’s implied covenants of good faith and fair dealing to Takeover “only extends to
 19 obligations expressed in the actual contract.” *Rutter*, 2022 WL 1443336, at *7. And Takeover
 20 has not explained what terms of the NPA or Notes were frustrated by Deppoleto’s actions.
 21 Notably, it is undisputed that Takeover received at least \$1.5 million from Deppoleto pursuant
 22 to the NPA and Notes, and Takeover has not argued that any of Deppoleto’s actions prevented
 23 Takeover from receiving the benefits of those funds.
 24

25 4. The “Instrumentality Theory” has no application to this case.

26 For its final affirmative defense, Takeover argues that the “instrumentality theory”
 27 excuses it from repaying Deppoleto the Notes and Supplemental Loans.⁵ The instrumentality

28 ⁵ As with Takeover’s defense of the implied covenant of good faith and fair dealing, Takeover

theory expresses a “rule that, when one corporation controls and dominates another corporation to the extent that the second corporation becomes the ‘mere instrumentality’ of the first, the dominant corporation becomes liable for those debts of the subservient corporation attributable to an abuse of that control.” *Krivo Indus. Supply Co. v. Nat’l Distillers & Chem. Corp.*, 483 F.2d 1098, 1101 (5th Cir. 1973). Takeover’s instrumentality theory argument relies entirely on *Krivo*, a Fifth Circuit case applying Alabama law. Takeover has not cited a single Nevada case that adopts the instrumentality theory, and Takeover has not offered any explanation as to why the Court should adopt it now.⁶ Even if the Court were to consider the instrumentality theory from *Krivo*, Takeover fails to satisfy the high burden required to prevail on that theory.

“[T]he control required for liability under the ‘instrumentality’ rule amounts to **total domination** of the subservient corporation, to the extent that the subservient corporation . . . functions solely to achieve the purposes of the dominant corporation.” *Id.* at 1106 (emphasis added). Neither the “mere loan of money” from a lender to a borrower, nor “[m]erely taking an active part in the management of the debtor corporation” constitutes total control under the instrumentality theory. *Id.* at 1105. *Krivo* also recognized that “inherent in any creditor-debtor relationship” is the major creditor’s “capacity to exert great pressure and influence” over the debtor, but the “existence and exercise of such power” does not by itself rise to the level of control for the purposes of the instrumentality rule. *Id.* at 1114.

Takeover argues that the instrumentality rule applies to preclude Deppoleto’s recovery under the Notes and Supplemental Loans for three reasons: (1) because Deppoleto allegedly promoted himself as a Director of Takeover; (2) because an accountant who formerly worked with Deppoleto offered to assist Takeover to “streamline the admin[istrative] and accounting duties for Takeover”; and (3) because Takeover entered a business deal with Dollar General that Pavlik allegedly advised against. Once again, Takeover’s argument fails, because it relies

has never timely pleaded this defense, either.

⁶ Plaintiff has not identified any case law in Nevada or the Ninth Circuit discussing the “instrumentality theory.”

1 entirely on inadmissible evidence. *See Orr*, 285 F.3d at 773 (“A trial court can only consider
2 admissible evidence in ruling on a motion for summary judgment.”).

3 First, and as already explained above, the only evidence that Takeover offers in support
4 of its allegation that Deppoleto promoted himself as a Director of Takeover is a single
5 presentation slide that amounts to inadmissible hearsay from Pavlik. Next, Takeover argues
6 that Deppoleto “sought to control” Takeover because an accountant that worked with
7 Deppoleto offered to assist with Takeover’s administrative and accounting duties. (Dkt. No.
8 111 at 19-21.) In support of this allegation, Takeover cites to email correspondence between
9 the accountant, Amy Allen, and Tucker, Takeover’s President. However, this email
10 correspondence is inadmissible, because it is not authenticated by either Allen or Tucker, and it
11 therefore cannot be considered on summary judgment. *See Stokes v. Olympian Leisure Servs.*,
12 No. 2:22-CV-01228-CDS-MDC, 2024 WL 1928748, at *2 (D. Nev. May 1, 2024) (“Under
13 [Fed. R. Civ. P.] 56(e), exhibits attached to affidavits for the purpose of summary judgment
14 must be identified and authenticated.”); *see also Orr*, F.3d at 773 (“Authentication is a
15 condition precedent to admissibility, and this condition is satisfied by evidence sufficient to
16 support a finding that the matter in question is what its proponent claims.”).

17 Third, Takeover provides lengthy quotations from Pavlik’s deposition, to apparently
18 argue that Deppoleto influenced a business deal that Takeover entered with Dollar General.⁷
19 Once again, Takeover’s argument relies entirely upon inadmissible evidence in the form of
20 hearsay from Pavlik. Pavlik plainly stated that he “had no real involvement” with the deal.
21 (Dkt. No. 102-4 at 22:3-8; *see also id.* at 21:16-22:8 (“I wasn’t involved in all the financial
22 dealings;” “I was, you know, pretty much not involved in any of the correspondence with the
23 additional investments;” *id.* at 25:4-8 (“I was sort of frozen out and had limited knowledge of
24 what was going on, other than what I learned after the fact.”).) Because Pavlik has no personal
25 knowledge of Takeover’s alleged deal with Dollar General or Deppoleto’s involvement,
26

27
28 ⁷ It is genuinely difficult to discern Takeover’s argument, because Takeover provides lengthy
citations without any supporting explanation.

1 Takeover's argument necessarily fails.

2 But even if the Court considers all of Takeover's (inadmissible) evidence and accepts a
3 legal doctrine that Nevada has never recognized, Deppoleto's involvement with Takeover still
4 does not rise to the level of control required to determine that Takeover was a "mere
5 instrumentality" of Deppoleto and that Deppoleto abused that control. *See Krivo*, 483 F.2d at
6 1101. Deppoleto's alleged control over Takeover – allegedly arising from a singular reference
7 to Deppoleto as a Director, Allen's offer of accounting assistance, and a business deal with
8 Takeover – does not amount to "total domination" required to prevail on its defense. *See id.* at
9 1106 (holding that an internal auditor installed by the creditor at the debtor corporation who
10 "provided internal financial management assistance," "kept a tight rein on disbursements," and
11 "was not afraid to exercise his power," did not rise to the level of control for the purposes of the
12 instrumentality rule).

13 In conclusion, Takeover failed to demonstrate a dispute of material fact that would
14 preclude a determination that Takeover entered valid contracts with Deppoleto in the form of
15 the NPA, Notes, and Supplemental Loans; that Takeover breached its repayment obligations to
16 Deppoleto; or that Deppoleto has been damaged as a result. *See, e.g., Saini v. Int'l Game*
17 *Tech.*, 434 F. Supp. 2d 913, 920 (D. Nev. 2006) (providing the three required elements to
18 succeed on a breach of contract claim). Therefore, there is no genuine dispute that Takeover is
19 liable for breach of contract. As such, the Court should grant Deppoleto's Motion for Partial
20 Summary Judgment against Takeover on Count II.

21
22 **B. The Court should grant Deppoleto summary judgment on his fraudulent transfer**
23 **claim.**

24 Takeover argues that Nevada's business judgment rule shields it from liability for
25 fraudulently transferring assets, and that the same rule protects Holley and Zarro from
26 judgment against them for receiving the fraudulent transfers. However, the Nevada business
27 judgment rule offers them no such protection, and because of their failure to raise a genuine
28 dispute of material fact, Deppoleto is entitled to judgment as a matter of law on the fraudulent

1 transfer claim against Takeover, NextGen Beverages, Holley, and Zarro.

2 The reasonable business judgment rule provides, in relevant part, that:

3 [D]irectors and officers, in deciding upon matters of business,
4 are presumed to act in good faith, on an informed basis and with a
5 view to the interests of the corporation. A director or officer is not
6 individually liable for damages as a result of an act or failure to act
7 in his or her capacity as a director or officer except as described
8 in subsection 7.

9 Nev. Rev. Stat. § 78.138(3) (emphasis added). Subsection 7 states:

10 [A] director or officer is not individually liable to the corporation
11 or its stockholders or creditors for any damages as a result of any
12 act or failure to act in his or her capacity as a director or officer
13 unless:

14 (a) The presumption established by subsection 3 has been
15 rebutted; and

16 (b) It is proven that:

17 (1) The director's or officer's act or failure to act constituted
18 a breach of his or her fiduciary duties as a director or
19 officer; and

20 (2) Such breach involved intentional misconduct, fraud or a
21 knowing violation of law.

22 Nev. Rev. Stat. § 78.138(7) (emphasis added).

23 **1. The reasonable business judgment rule does not shield Takeover from**
24 **liability for its corporate actions.**

25 As the business judgment rule makes plain, it operates to protect officers and directors
26 from *individual* liability for their good faith actions taken in their official capacities. *Guzman*
27 *v. Johnson*, 2021, 483 P.3d 531, 137 Nev. 126. As the plain text of the statute demonstrates,
28 the business judgment rule is silent as to protections for the corporation itself.⁸ Accordingly,
the business judgment rule does not shield Takeover for liability for the following fraudulent
transfers: (a) dismissing its legal claims against Holley in the Arizona Lawsuit; (b) paying
Holley a \$5,000.00 “settlement payment” after wrongfully dismissing the Arizona Lawsuit; (c)

⁸ If the business judgment rule applied to actions of corporations, corporations would never be
liable for claims as simple as breach of contract since they could always claim that it was in their
business interest to breach the agreement.

1 selling hydrogen water to Zarro for 40% of its retail value; (d) selling gamer shots to Zarro for
2 30% of its retail value; (e) transferring the recipe for Takeover's hydrogen water to NextGen
3 Beverages; and (f) transferring to NextGen Beverages at least \$25,000.00.

4 In addition to Takeover's misplaced argument regarding the business judgment rule,
5 Takeover contends that it is not liable for fraudulent transfer because Deppoleto has not proven
6 that Takeover acted with fraudulent intent. Takeover is mistaken. Under Nevada's Uniform
7 Fraudulent Transfer Act (UFTA), actual intent can be determined by several factors outlined in
8 the statute. *See Nev. Rev. Stat. §§ 112.80(2)(a), (d), (h), (i), (j)*. It is undisputed that Takeover
9 acted with actual intent, because its transfers to NextGen Beverages, Holley, and Zarro
10 occurred after Deppoleto sued Takeover in this lawsuit (*see Nev. Rev. Stat. 112.180(2)(d)*); the
11 consideration that Takeover received in exchange for the transfers was not reasonably
12 equivalent to the value of the assets transferred (*see Nev. Rev. Stat. 112.180(2)(h)*); and
13 Takeover was insolvent at the time of the fraudulent transfers (*see Nev. Rev. Stat.*
14 *112.180(2)(i)*). But even if Deppoleto had not proven Takeover's actual intent to transfer assets
15 beyond Deppoleto's reach, Takeover is still liable for constructive fraudulent transfer (*see Nev.*
16 *Rev. Stat. §§ 112.180(b)(1)-(2)*), and for fraudulent transfer by an insolvent debtor (*see Nev.*
17 *Rev. Stat. § 112.190(1)*). Takeover does not dispute that it made the fraudulent transfers at a
18 time when its assets "were unreasonably small in relation to the business," *see Nev. Rev. Stat. §*
19 *112.180(b)(1)* (constructive fraudulent transfer), or that Takeover was insolvent at the time of
20 these transfers, *see Nev. Rev. Stat. § 112.190(1)* (fraudulent transfer by an insolvent debtor).

21 Takeover also attempts to raise factual disputes regarding its transfer of the hydrogen
22 water recipe and at least \$25,000.00 to NextGen Beverages. But none of Takeover's arguments
23 rise to the level of creating a genuine dispute of material fact. First, Takeover contends that the
24 Court should set aside NextGen Beverage's admission that it received the hydrogen water
25 recipe, and instead only consider the testimony of Pavlik, who claims that NextGen Beverages
26 created brand-new products. However, Zarro served as NextGen Beverage's Rule 30(b)(6)
27 corporate representative, and when asked whether NextGen Beverages has used any recipes
28

1 from Takeover, Zarro testified that: “[T]he hydrogen water that NextGen sells is a product that
 2 shares a recipe that Takeover used to have before they discontinued the product and sued the
 3 manufacturer. That would be a shared recipe if you will.” (Dkt. No. 102-23 at 13:17-14:3.)
 4 Because Zarro was testifying as NextGen’s corporate representative, “there is no distinction
 5 between the corporate representative and the corporation, and the witness's testimony binds the
 6 company.” *Hi Q, Inc. v. Zeetogroup, LLC*, No. 22-CV-1440-LL-DDL, 2023 WL 4096224, at
 7 *4 (S.D. Cal. June 20, 2023). As such, according to NextGen Beverages, it is undisputed that it
 8 received the hydrogen water formula from Takeover.

9 Second, Takeover argues that it is not liable for fraudulently transferring \$25,000.00 to
 10 NextGen Beverages, because Takeover claims it transferred that money to NextGen Beverages
 11 pursuant to a loan agreement. Takeover’s defense falls flat. Notably, Takeover does not
 12 dispute that it made those transfers to NextGen Beverages, which apparently used the funds for
 13 legal fees. (Dkt. No. 111 at 27.) And even if Nevada law recognized that purported loan
 14 agreements are a defense to fraudulent transfer claims – a position for which Takeover offers
 15 no legal authority – Takeover has not offered any evidence that NextGen actually repaid
 16 Takeover. Because Takeover cannot defeat summary judgment “by relying solely on
 17 conclusory allegations unsupported by factual data,” Deppoleto is entitled to judgment as a
 18 matter of law against Takeover for fraudulent transfer. *See Bullard v. Las Vegas Valley Water*
 19 *Dist.*, No. 215CV00948JADVCF, 2018 WL 715358, at *9 (D. Nev. Feb. 5, 2018).

20
 21 **2. The reasonable business judgment rule does not apply to Holley’s and
 Zarro’s acceptance of fraudulent transfers in their personal capacities.**

22 It is undisputed that Holley and Zarro accepted fraudulent transfers from Takeover, *see*
 23 *Nev. Rev. Stat. § 112.220(2)(a)* (judgment for fraudulent transfers may be entered against “[t]he
 24 first transferee of the asset or the person for whose benefit the transfer was made”), yet Holley
 25 and Zarro contend that the business judgment rule protects them from judgment. Defendants
 26 misunderstand the scope of the business judgment rule. Holley and Zarro’s argument fails
 27 because the business judgment rule only applies to decisions made by an officer or director “**in**
 28 **deciding upon matters of business**” and in “**his or her capacity as a director or officer.**”

1 Nev. Rev. Stat. § 78.138(3) (emphasis added). Stated differently, the business judgment rule
 2 limits avenues “to hold directors and officers individually liable for damages **arising from**
 3 **official conduct.**” *Chur v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 68, 72–73,
 4 458 P.3d 336, 340 (2020) (emphasis added); *see also Shoen v. SAC Holding Corp.*, 122 Nev.
 5 621, 635, 137 P.3d 1171, 1181 (2006) (“The business judgment rule, however, pertains only to
 6 directors whose conduct falls within its protections.”). Holley and Zarro cannot seriously
 7 contend that they accepted products and settlement payments in their official capacities as
 8 Directors and Officers of Takeover. Because it is undisputed that Holley and Zarro accepted
 9 the benefit of Takeover’s fraudulent transfers in their individual capacities, the business
 10 judgment rule offers them no protection from judgment.

11 And because there is no dispute that Takeover fraudulently transferred assets, the Court
 12 should enter judgment against Takeover for the value of the transferred assets, totaling at least
 13 \$355,000.00, and the Court should also issue an injunction to prevent Takeover from further
 14 disposing of assets. *See Nev. Rev. Stat. §§ 112.210(1)(c)(1), (2)*. Further, because there is no
 15 dispute that NextGen Beverages, Holley, and Zarro accepted fraudulently transferred assets
 16 from Takeover – for which the business judgment rule provides them no protection – they
 17 should also have judgment entered against them for the value of the transferred assets.

18 CONCLUSION

19 For all the above reasons, the Court should grant Partial Summary Judgment against
 20 Takeover on Count II (breach of contract), and against Takeover, NextGen Beverages, Holley,
 21 and Zarro on Count VII (fraudulent transfer).
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1 DATED this 14th day of February, 2025.

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CERTIFICATE OF SERVICE

1
2 1. On February 14, 2025, I served the following document(s): **PLAINTIFF'S**
3 **REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY**
4 **JUDGMENT PURSUANT TO FED. R. CIV. P. 56(a)**

5 2. I served the above document(s) by the following means to the persons as listed
6 below:

7 ☒ a. ECF System:

8 On all parties appearing, receiving, and requesting notice.

9 ☐ b. United States mail, postage fully prepaid:

10 ☐ c. Personal Service:

11 I personally delivered the document(s) to the persons at these addresses:

12 ☐ For a party represented by an attorney, delivery was made
13 by handing the document(s) at the attorney's office with a clerk or other person in
14 charge, or if no one is in charge by leaving the document(s) in a conspicuous place
15 in the office.

16 ☐ For a party, delivery was made by handling the document(s)
17 to the party or by leaving the document(s) at the person's dwelling house or usual
18 place of abode with someone of suitable age and discretion residing there.

19 ☐ d. By direct email (as opposed to through the ECF System):
20 Based upon the written agreement of the parties to accept service by email or a
21 court order, I caused the document(s) to be sent to the persons at the email
22 addresses listed below. I did not receive, within a reasonable time after the
23 transmission, any electronic message or other indication that the transmission was
24 unsuccessful.

25 ☐ e. By fax transmission:

26 Based upon the written agreement of the parties to accept service by fax
27 transmission or a court order, I faxed the document(s) to the persons at the fax
28 numbers listed below. No error was reported by the fax machine that I used. A
copy of the record of the fax transmission is attached.

☐ f. By messenger:

I served the document(s) by placing them in an envelope or package addressed to
the persons at the addresses listed below and providing them to a messenger for
service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 14, 2025.

By: /s/ Patrick M. Harvey